



The Architecture of Public Health Statutes and Administrative Regulations

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THE DRAFTING of statutes is more art than science and is perhaps closer to architecture than to English composition. The task could be analogized to many artistic efforts. It could be compared to painting, and we could now begin with bare canvas and work our way to the finished picture. But the simile of architecture seems to me to hold truest.

Before the architect begins to design a building, he is limited by the terrain, climate, materials, and money available, and by the local building code. The same is true with the legislative draftsman. When he begins his work, he is limited by factors similar to those facing the architect. Within these limitations the statutory artisan must build his monument of law, his legislative lighthouse—avoiding as much as possible ending up with a Tower of Babel.

Terrain and Climate

In considering the preparation of a new law in public health, the draftsmen and the policy-makers are faced with many limitations of terrain and climate.

The terrain can be compared to the already existing law of the jurisdiction. It must be examined closely to see where the new law will fit into the existing codes or statute books. Sometimes blasting of rocks or cutting away of hills is necessary. The legal equivalent is the repeal of existing law to make way for the new. Strange as it may seem, architects and drafts-

men alike sometimes forget the essential first step of examining the terrain and fitting the structure to it. Architecturally, this is the placing of an imitation ranch house on a tight little city block with its huge picture window looking squarely into the next-door neighbor's picture window or into a blank brick wall. Legally, it is importing a model law on plumbing from New York City, or the American Public Health Association headquarters, and plunking it down in the arid desert of a southern California town without any effort at adapting the model code to local conditions.

The climate must also be examined before a new law is offered by public health authorities. The area must be ready for it. The political, social, legal, and medical-society climate must be such that the bill can get through the legislative process looking at least generally like the structure desired. It must be rugged enough to weather political and other storms during its expected life. Again, we must be careful with "model laws." What works in Philadelphia may not work in Phoenix. The climate is different.

Planning for Occupancy

When the architect begins planning a building, he works with the people who commissioned him, those who will occupy the building. The best buildings of today, the most useful, are those designed by architects who have had a close working relationship with the future occupiers. In legislative drafting this same relationship must be established.

For public health people, the situation usually

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begins with a problem. It may be low standards in the nursing homes or in day-care nurseries. The public health officials decide that perhaps a new law or new regulations are needed. A meeting of the public health workers associated with the program is called to discuss new laws or regulations and to look at the old ones. Perhaps they examine the laws or regulations of another State or city. Frequently a draft of new regulations is completed before a lawyer is called in. Public health agencies often adopt regulations without reviewing them with other agencies of the same government or with the public groups they affect.

Here I hark back to my analogy to the architect discussing with prospective occupiers their needs in the building. Public health authorities are not the sole occupiers of the law they are drafting. They must also include those who must "live within it"—we even use those terms—those who must obey it, such as the nursing home operators. I urge you to consult the "occupiers" of your new regulations and statutes; involve them in the process of drafting. The drafting sessions can be used as one means of gaining acceptance of your policies and ideas. You should be ready to accept changes and adjustments to get the acceptance and compliance of those who will be affected by the law.

"Compromise is the life of the legislative process," said T. V. Smith. It is also the life of legislative drafting. This is particularly true of public health law since public health agencies do not have huge law-enforcement staffs, nor do they relish the use of police methods to carry out programs. Nearly all public health officers prefer education to enforcement. Therefore, most public health laws must be self-executing, clear and understandable, and, basically, have the support of the affected public groups as a reasonable, intelligent effort in the public interest.

Structure of Laws and Regulations

Next I propose to examine the various parts of a statute and some rules of legislative drafting.

Titles. A bill presented to the legislature must have a title. As much care should be taken in its formulation as with any other part of the law. First, the title should be wide enough in

scope to cover everything in the bill and everything which conceivably might be added to it later while it is in committee. Otherwise the statute could be challenged, and subject matter not covered by the title could be held null and void. Second, and very important, the title should encourage support for the bill. Many times in the legislative process only the title is listed or read. It should sound "good." Making public health bills sound good is usually fairly easy. One can even make them sound exciting at times. Do so. Don't say, "A Bill to Change the Water Main System in Certain Cities." Say, "A Bill to Increase and Purify the Public Water Supply in Oakland and Berkeley." Tell the people what benefit they will get from the bill and tell them which people will get it. And don't forget political factors. In a bill on reorganization of the tuberculosis hospital system in Massachusetts drafted at the Law-Medicine Institute, we removed certain authority from the counties and increased some powers of the State. But in doing so, we expanded the initiative of the cities and towns and removed some of their tax burden. It was the lightened tax burden that we stressed in the title of the bill, and this did much to spike the arguments of the counties. Don't be afraid of a long title. Drafting is not a contest to achieve brevity. A title is a means of identification and a rallying cry for support. Use it fully and properly for these purposes.

Preambles. Legislative bills can be accompanied by a preamble which explains why the bill is being filed. It is an argumentative statement of the problem which the legislation is intended to remedy. It can be recognized by words such as "whereas" at the beginning. Preambles were very popular in the early years of this nation when language in general was more studied and flowery. They have fallen into disuse in most States. However, they are quite useful to introduce unusually long or complicated legislation initiating entirely new programs. For example, I used a preamble to the very long bill reorganizing the tuberculosis hospital system in Massachusetts.

On the Federal level and in a few States, legislation setting up new programs often leads off with a section entitled "Declaration of Policy" which is similar to a preamble. It sum-

A Brief Bibliography

While few books and papers have been written on the subject of legislative drafting, the following publications are useful sources of information:

C. K. Allen: *Law in the Making*. Clarendon Press, Oxford, 1952.

L. Baumgartner and F. P. Grad: *A New Health Code for New York City*. *American Journal of Public Health* 49: 1313-1328 (1959).

W. J. Curran: *Preparation of State and Local Health Regulations*. *American Journal of Public Health* 49: 314-321 (1959).

R. Dickerson: *Legislative Drafting*. Little, Brown and Co., Boston, 1954.

R. H. Hamlin: *Public Health Law or the Interrelationship of Law and Public Health Administration*. *American Journal of Public Health* 51: 1733-1737 (1961).

Many States have a legislative drafting manual published and distributed by the legislative council or legislative research council of the State government. They contain the details on special problems of the various States and the legislative process for hearings and the passage of bills.

In January 1964 the Harvard Law School began publication of the *Harvard Journal of Legislation*. This twice-yearly periodical should be a valuable source of information on legislative process and methods.

marizes the objectives of the program, and it is an aid to administrators and courts in interpreting the language of the law.

If preambles or declarations of policy are used, great care should be taken in their drafting. Like the title, they are excellent tools in rallying support for the bill. Also, since they can influence interpretation, bad draftmanship can come back to haunt the sponsors if the result is restrictive or narrow interpretation.

Definitions. Often the first sections of a new statute or set of regulations contain definitions of words to be used in the law. Such definitions are usually employed for either of two purposes: (a) to aid clarity by defining an uncom-

mon or technical term once and thus save space required to define it each time it appears in the law, and (b) to save space by abbreviating a long title or name each time it appears.

I caution against the use of separate definitions as much as possible. Certainly, separate definitions should not even be considered unless the terms appear more than once or twice in the set of laws or regulations. The reason for this admonition is to avoid forcing the reader to search for the full meaning of the law. The inexperienced reader may not know enough to look in the section on definitions. He may read only what he considers important, the law addressed to him. For example, a model housing code contains a section requiring landlords to put up screens in the summertime. The landlord may not look up the definition of "screen" appearing many pages earlier at the beginning of the chapter, a definition which tells him what type of screen, what fineness of mesh, is required. Also, he may not look up "summertime," which the definition tells him begins on May 1 of each year. Without these two definitions the regulatory section is worthless. Yet this is the only time either of these terms appears in the model code.

At times, definitions in separate sections cannot be avoided. In definitions to save space by abbreviating, the most frequent abbreviations are for the full title of the health agency, such as "department" for Department of Health, Education, and Welfare. As long as confusion does not arise concerning other departments, this does save unnecessary repetition.

In the first kind of definition, the clarifying kind, more care in drafting is necessary than with the abbreviating kind.

I group these clarifying definitions into two types, "the classic type" and "the enumerating type." In the classic type, the term is defined dictionary fashion, giving its properties, the essence of the term. In the enumerating type, a list of different categories of things is placed in the definition, such as "restaurant includes . . ."

The classic definition is clearer and more precise, but the enumerating definition is more popular with lawyers. First, its very lack of precision gives the impression to the draftsman that it is safer. It can be left with an open end

to allow for a listing of other things later as the program expands or as experience is gained. Second, judges can be counted on to expand the term when necessary to include similar activities or groups which would seem to have been intended. Care must be used in these enumerating definitions, however, to be sure that the items listed are covered generally by the word chosen. The generic term should be used. For example, one well-known model code uses the term "restaurant," and its definition includes drugstore soda fountains, mobile canteens, and school lunchrooms. Actually, the generic term "eating establishments" should have been used.

The world of statute drafting is a bit like that of Humpty Dumpty in "Through the Looking Glass." He told Alice, "When I use a word, it means just what I choose it to mean—neither more nor less." Words can be made to mean just what the draftsman says they mean, but only in law and law courts. The public may not follow these rules. There are some interesting examples of this practice in the law: a Federal act was amended to make the term "parent" include siblings and cousins, and a well-known English statute provided that the word "cows" included horses, mules, asses, sheep, and goats!

Nevertheless, although I caution against overuse of separate definitions, I have an obligation to speak of what is as well as what ought to be. In this respect I suggest reading the definition sections of statutes very carefully. Many legislative draftsmen use these devices as an expression of the scope of their legislative program or policy. You will recall my earlier example of the statute requiring landlords to put up screens in summertime. The definitions of these words completely control the statute.

A good example on the Federal level is the Medicare Act for Dependents of the Armed Forces. The first two definitions in section 1 of the act are "uniformed forces" and "dependent." These terms are the keys to this act, the beneficiaries to be covered by the program. Actually, this particular act is nothing much more than a series of definitions. The next sections define the medical benefits and charges to be made.

I must admit I have used this method in drafting myself. It gives one a certain sense

of magical, creative power. I have defined such controversial terms as "insane" and "mentally ill." The latter is just as difficult as the former. I have defined "person" and "drug addict" and "drunkenness."

There is another word game one can play here. One can think up new words and give them their own new meanings! For example, in drafting the Massachusetts law on recalcitrant tuberculosis patients, we were concerned with the skid-row alcoholic with active tuberculosis who is often a menace on the streets. Frequently he has no real home and gets his mail, if any, at a local tavern. The cities and towns refused to pay part of the bill for the hospitalization of such a person because he wasn't "settled" in their town; that is, he was not proved to have lived in the town for a certain, continuous period of time. We wanted to shift some of the burden of care of these cases from the cities and towns to the State. But which cases should be taken and what do you call them? I invented the term "chronically nonresident." I defined it and set up an administrative board with local representatives on it to decide which cases would be switched to the State. I was very proud of my new words!

To sum up, in dealing with legislative definitions, be careful. Read them. Don't fail to look at the definitions of words that seem quite simple. Remember Humpty Dumpty.

Legal commands. It is important to remember that a statute or a regulation is a legal command. It must, therefore, contain all the elements of a command. It must (a) designate the persons or groups who must obey it, (b) designate the official who has the responsibility of enforcing it, and (c) provide a means of enforcement, a penalty or reward. For example, a housing code says, "All heating stoves shall be maintained in a clean and safe manner." Who shall maintain them, the tenant or the landlord? What is the penalty for violation? It may vary greatly, depending on who has this responsibility. And what does "in a clean and safe manner" mean?

To avoid these common failings, it is best to use the active voice and to begin the sentence with the personal subject, the person or group who must obey them. "The landlord shall maintain the cooking stove . . ." The other

elements of the command should be included in the same section or in other parts of the complete set of laws or regulations. Care should be taken that general penalty clauses provide enough alternatives to cover the various kinds of violations. For example, in a housing code the health department may not want to condemn an entire dwelling or apartment because of insufficient windows in one room. An alternative penalty of closing off that one room might be provided.

Language and style. Next, the language and style of the statute or regulation should be understandable to the people who must obey it and not merely to the health department. We are talking, in architectural terms again, of the "occupiers of the building." The language of the statute should be tailored to the audience. This does not mean a complete absence of technical language. You can use technical language if the audience is technical. But if the audience is the general public, use simple terms. I should like to cite one excellent example I picked up at the 1963 annual meeting of the American Public Health Association in Kansas City. It is a paving brick designed in 1890 by a public health officer in Kansas and it says, "DON'T SPIT ON THE SIDEWALK." The brick was used throughout Kansas for many years in paving streets and sidewalks. It was a fine aid in tuberculosis control. Please note that the brick does not say "EXPECTORATING ON PUBLIC WAYS OR THOROUGHFARES IS PROHIBITED." This is excellent statutory drafting—on a paving brick!

Precision and clarity. What has been said about language and style is a necessary foundation for the next suggestion: Be as precise and specific as you can in stating the substance of the law in the command to people to do something. Tell them what to do and don't leave too many loopholes, too many alternatives of interpretation. This, I think, is perhaps the most violated principle of all in public health law drafting.

Public health laws and regulations are full of broad adjectives such as "adequate" and "clean." To avoid them, however, takes time, effort, and research. It means getting a drafting team to work to achieve technical precision in what they want in their programs. I repeat,

these drafting sessions with a group of public health workers around the table are part of programming. I've seen many a sanitary engineer squirm when asked just what he meant, technically, by a "well-lighted room." He might be persuaded to define it in foot-candles.

Why do I say this? Isn't it an advantage to have flexibility? It is, of course, but please examine the result. The audience addressed cannot clearly understand or obey such laws or regulations, and the law cannot be fully self-executing, as nearly all public health laws must be. If the manner of compliance is left unclear, health department enforcement people must interpret and enforce laws in particular instances. This places great discretion in enforcement people, many of whom may not be adequately trained to assume this responsibility. Also, a lack of uniformity in interpretation and enforcement may result, depending on the inclinations of the enforcer.

Don't think that the health inspector in the field likes this discretionary power. He is under great pressure when he tells a restaurant owner that something is not up to required standards. He gets many arguments. He feels much more secure with precise guidelines.

This rule of precision in language is not merely good drafting practice; it is a legal necessity. If a law or regulation commands certain action and exacts a criminal penalty for violation, it must be clear, as a matter of law. The people cannot be required to guess at its meaning or the courts will hold it "void for vagueness." The courts have applied this rule to public health laws.

Consistency. We should examine also what is called the statutory draftsman's cardinal rule: consistency. In the law, we do not use different words to mean the same thing. If we mean the same thing, we use the word or words again; we repeat. This is ingrained in the law, and if we don't do it, then you should suspect it is intentional and we mean different things.

There is also a legal requirement underlying this rule. People are entitled to equal treatment under the law. This means equal in little things, which, in a given instance, may become very, very important. A good draftsman has to develop a sixth sense as he is "building" his

law. He must recall, "Oh, yes, I used that term in section 2. Now what did I say there?" He must compare the two requirements to see if he is in an "equal treatment" situation.

My analogy to architecture applies again here. We must be consistent and build our legal structure so that the foundation supports the building and the parts fit together in a harmonious, utilitarian manner. This, then, is statutory drafting. We have come around full circle to the architect's skills.

Costs and Building Codes

The two remaining limitations imposed upon the architect in designing and constructing his building are the money available and the local building code. The matter of the "money available" is our simplest analogy. Be careful in statute drafting to have a reasonable expectation that the legislature will pass the appropriations to carry it out.

The "building code" for statutes is the legislative process itself; the procedures for putting a bill through the legislature. Public health workers should acquire knowledge of this process. The law should not be left to the legislators alone. You should go to hearings. You should know who is important in the legislature, who are your friends and your enemies. For regulations, you must also know the "building code." In most States and on the Federal level, this is the Administrative Procedure Act. These acts prescribe the necessary steps for the adoption, amendment, and revocation of regulations for all agencies. They set up requirements such as notice and public hearings or publication in newspapers or, for Federal regulations, publication in the Federal Register before a regulation can be adopted.

I was one of the draftsmen of the Administrative Procedure Act of Massachusetts some 10 years ago, before I began drafting public health regulations. This background was very good for me. I suggest a deep immersion in administrative law for any lawyer who is going to draft regulations in any field.

It should also be noted that it is often advisable, to gain flexibility in a program, to add to a statutory program a power to make regulations to clarify the law and to spell it out in

greater detail. Regulatory power should be considered as a desirable adjunct to any public health program. Regulations are much more easily adopted and changed than statutes. Legislative bodies are becoming slower and slower in taking action. In recent years the Federal Congress has been receiving substantial criticism in this regard. Many of the States are subject to the same comment. Until the situation changes, public health workers must rely heavily on the mechanism of administrative regulations.

A Note on Codification

Public health workers are sometimes confused by the terms used for groups of statutes or regulations: compilation, revision, and codification. A compilation of statutes implies only that it is a gathering of the statutes enacted over a given period of time. No substantive change is made in the statutes when so gathered. The statutes are subgrouped under various headings or classifications, usually in chapters or articles. Further subclassifications are usually made in sections.

A revision is usually a method of bringing a previous compilation up to date by removing repealed laws and some clearly obsolete provisions. This also means a reclassification or a renumbering of the surviving laws. It may or may not mean substantive change in the law, depending on the legal authority given the reviser.

A codification can be very similar to a compilation or a revision, but it can include much more radical changes in the law. A codification is more likely to include authority to change substantive law. It can also bring the law up to date by including in statutory form the rulings of the courts expressed in general principles. A codification can put all of the "law," both statutory and common law, in one place. This is done in the United States in those States known as "code States," such as New York and California. This method of law gathering is followed on the continent of Europe and in those U.S. States which were formerly Spanish or French territories.

In public health law these terms have been used quite loosely. "Sanitary codes" are groups

of statutes in some States and administrative regulations in others. New York City has its own public health "code." In theory, these codes should include all law on the subject under consideration and should be under constant surveillance for needed changes to keep them up to date with all court rulings or other changes in the law. We might wonder how many are receiving such attention.

Drafting for Administration or Courts?

The discussion on codification brings me to a final point. There is a great difference between drafting laws and regulations primarily for administrative enforcement and laws intended primarily for court enforcement. Most of this paper is concerned with administrative enforcement. For court enforcement, a different approach is recommended. The language would be more technical but open ended in many areas.

Many lawyers trained to look to the courts for all guidance do not realize these distinctions. They consider the subject of legislative drafting as if only court interpretation and enforcement are to be expected. Yet literally thousands of statutes, many of them very im-

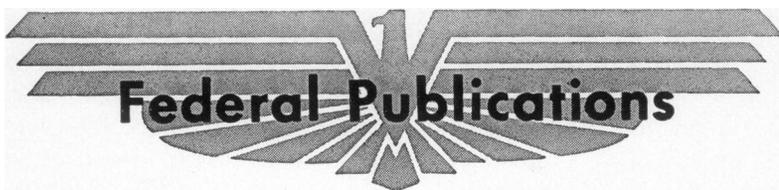
portant, never receive court interpretation. Lawyers are prone to say that a law means only what a judge says it means. Actually, most statutes and regulations mean what administrators of those laws make them mean. Even when judicial interpretation differs from administrative practice, the agency is often able to get the law changed to conform with its policy for future cases. In the drafting process, this means that it is often advisable to take a chance on contrary judicial interpretation rather than tie the hands of administration in a particular area.

Conclusion

The drafting of statutes is an architectural skill, an exercise in construction for occupancy by living, dynamic programs. This paper has been intended to provide an outline of the basic rules in the drafting of a special kind of legislation, public health, which requires cooperation and understanding between a number of professional groups. With this cooperation, legal structures can be of substantial aid in carrying out the objectives of a variety of health programs in the public interest.

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The Comprehensive Community Mental Health Center. Concept and challenge. *PHS Publication No. 1137; April 1964; 22 pages; 15 cents.* Summarizes the intent of Congress in adopting the Community Mental Health Centers Act of 1963 (Public Law 88-164) authorizing Federal matching funds to finance part of the cost of building community mental health centers. The booklet describes procedures for sponsoring and financing community mental health centers. It lists treatment services to be included in them as the means by which patients will receive a continuity of treatment in the home environment. Examples of community mental health facilities currently providing basic services of the comprehensive treatment concept are presented as guidelines for communities which are preparing plans for similar centers.

Community Mental Health Advances. *PHS Publication No. 1141; 1964; 22 pages; 20 cents.* Gives details of the Community Mental Health Centers Act and other federally aided programs in the mental health field. Reports of promising community-oriented services throughout the country, some of them supported by NIMH grants, are included to inform the increasing number of persons concerned with strengthening community mental health programs about new and interesting developments. Also included are sections on recent State legislation relating to mental health, a calendar of events for 1964, and current reading.

How To Study Patient Progress. *PHS Publication No. 1169; 1964; by Doris E. Roberts and Helen H. Hudson; 121 pages; 75 cents.* A guide to a patient-centered study method which was developed in the Division of Nursing to help public health agencies improve their nursing services. Includes schedules to

help public health nurses, as well as nurses in other community health programs and students in schools of nursing, make periodic assessments of patients' needs and document patient progress in relation to nursing service given. Provides statistical procedures and codes for tabulation of study data.

Farming Practices and Concentrations of Fission Products in Milk. *PHS Publication No. 999-R-6; 1964; by Warren G. Hansen, Jephtha E. Campbell, Jack H. Fooks, H. Clifford Mitchell, and C. Howe Eller; 36 pages, 3 appendixes.* Describes studies conducted in the St. Louis area over a 3-year period. The studies showed that optimal fertilization of the land can reduce levels of strontium 90 and iodine 131 in the milk of grazing cows. A mechanism of dilution of radionuclide contaminants in the larger volume of forage was shown to account for a 50 percent reduction in radionuclide contamination, as compared to marginally fertilized farms.

Diabetes. *PHS Publication No. 137 (Health Information Series No. 70); revised 1964; pamphlet; 5 cents, \$2.50 per 100.* Presents elementary facts on diabetes for laymen. Discusses symptoms, blood tests, insulin, oral drugs, urine tests, diet, and exercise.

National Institutes of Health Scientific Directory 1964 and Annual Bibliography 1963. *PHS Publication No. 1131, Public Health Bibliography No. 43; 1964; 202 pages; 60 cents.* Presents broad outlines of NIH structure, names professional staff as of 1964, and lists scientific and technical publications for 1963. Includes an author index which lists names of staff members in either the directory or the bibliography. The subject index is intended to supply an idea of the scope of NIH work as well as a quick and convenient

reference to areas of research. The publication should be of special interest to research workers in the biomedical sciences inside and outside government.

Class Specifications for Nursing Positions: A guide for State and local health agencies. *PHS Publication No. 1122; 1964; 18 pages.* This manual, compiled by representatives of the Public Health Service, the Children's Bureau, and the Division of State Merit Systems, should help State and local health agencies prepare appropriate specifications for present-day nursing positions. Discusses the broad purposes of position classification and provides samples to guide development of class specifications for various levels of professional nursing positions. Also included are definitions and minimum qualifications for the licensed practical nurse and the nurse aide.

Facts and Trends on Hospital Outpatient Services. *PHS Publication No. 930-C-6; 1964; 24 pages; 25 cents.* Discusses the role of hospital outpatient services in the light of changing social and economic trends, the factors to be considered in planning such services, and the data required for planning. In addition to compiling statistical information on outpatient services, the publication contains a section on definitions and terminology as a guide to more effective communication in the field.

This section carries announcements of new publications prepared by the Public Health Service and of selected publications prepared with Federal support.

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